No. 17-571

In the Supreme Court of the United States

FOURTH ESTATE PUBLIC BENEFIT CORPORATION,
PETITIONER

v.

WALL-STREET.COM, LLC, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Section 411(a) of the Copyright Act limits the circumstances under which a copyright owner may initiate an infringement action. In particular:

> [N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights.

17 U.S.C. 411(a).

In this case, petitioner sued respondents after petitioner applied for registration of its copyright claim but before the Copyright Office "regist[ered]" the claim or "refused" registration. The question presented is:

Whether a copyright-infringement suit may be "instituted" before "registration of the copyright claim has been made" or "refused" by the Copyright Office.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, respondent Wall-Street.com, LLC certifies that it has no parent company and that no publicly held company owns 10% or more of its stock.

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BRIEF FOR THE RESPONDENTS

In Section 411(a) of the Copyright Act, Congress imposed a simple administrative prerequisite for filing a copyright-infringement suit: an action may be instituted only once "registration * * * has been made" or "registration has been refused." 17 U.S.C. 411(a). That is it—registration or refusal. An *application* for registration is obviously neither. This case accordingly begins and ends with the plain text.

Petitioner's quixotic effort to argue otherwise would require this Court to jettison that text. Petitioner says that "registration" has nothing to do with the Register; instead, a copyright owner alone makes registration merely by filing an application. But petitioner's effort to

equate "registration" with "an application for registration" defies ordinary meaning and would render superfluous multiple provisions in the Copyright Act.

When a statute's language is as clear as Section 411(a), no plumbing of Congressional intent or searching of the Congressional record is necessary—but here the harmony between text, history, and policy is satisfying. Congress's choice to condition the right to sue upon the administrative finality of registration or refusal was no mistake; it was the result of two decades of formal study of copyright reform. Ultimately, Congress was choosing between making copyright registration mandatory, making it permissive, or eliminating a public registration system entirely. It chose the middle ground, with a nudge: making registration permissive but encouraging promptness.

Petitioner wants a different regime—one narrowly focused on making life as easy as possible for copyright plaintiffs. But its policy arguments amount to an insistence that Congress simply cannot have meant what it said. It did, and for good reason. Petitioner's myopic policy preferences fail to account for the systemic benefits of registration. And upon inspection, its parade of horribles is mere tilting at windmills. In the end, only Congress is suited to resolve the policy tradeoffs inherent in *any* system of copyright registration. And it decided an application alone could not unlock the courthouse doors.

STATEMENT

A. Statutory Background

1. The Copyright Act of 1976, 17 U.S.C. 101 *et seq.*, comprises the most recent wholesale revision of U.S. copyright law. It embodies the heady idea that a carefully balanced system of copyright sanctions and incentives can promote creation, growth, and advancement of our civil

society. Put another way, the copyright laws exist to benefit the public at large: "As reflected in the Constitution, the ultimate purpose of copyright legislation is to foster the growth of learning and culture for the public welfare, and the grant of exclusive rights to authors for a limited time is a means to that end." *Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 5 (Comm. Print 1961) ("1961 Report").

a. Under the Copyright Act, copyright owners have certain "exclusive rights" in "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. 102, 106. "Registration is not a condition of copyright protection," 17 U.S.C. 410(a), but Congress provided multiple incentives to encourage creators to promptly apply.

To that end, the Act specifically addresses both the application process and the standards for the Register to use in making registration determinations:

Section 409, titled "Application for copyright registration," provides that "[t]he application for copyright registration shall be made on a form prescribed by the Register of Copyrights." The basic application forms are available on the Copyright Office website. See U.S. Copyright Office, *Forms*, https://www.copyright.gov/forms/. The forms request routine information such as the author's name and title of the work. None of the five basic forms exceeds two pages. Fees for basic registrations range from $35-$85, depending on the type of work and form of application (*i.e.*, paper vs. online). See U.S. Copyright Office, *Fees*, https://www.copyright.gov/about/fees.html.

Section 410, titled "Registration of claim and issuance of certificate," governs the Register's registration decision. The Register must "register the claim" if, "after examination, the Register of Copyrights determines that * * * the material deposited constitutes copyrightable

subject matter and that the other legal and formal requirements of this title have been met." 17 U.S.C. 410(a). The Register must "refuse registration" if she "determines that * * * the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason." 17 U.S.C. 410(b).[1]

b. The time it takes for the Copyright Office to process a claim has fluctuated over the years, varying with factors like new technology and staffing cuts (or additions). At the time Congress drafted the Copyright Act, processing times were considerably shorter—no more than a few weeks for claims not involving correspondence. U.S. Gov't Accountability Office, *Improving Productivity In Copyright Registration* 3 (1982) ("GAO Report") (ranging from 1-2 weeks in 1957 to 5-6 weeks in 1981).

The Copyright Office occasionally has sought fee increases to cope with increased workloads. For example, the Office cut processing times for routine claims in half (from 12 weeks to 6) using extra funding from the Copyright Fees and Technical Amendments Act of 1989. U.S. Copyright Office, *Annual Report of the Register of Copyrights* 1 (1991).

And in 2014, the Register testified to Congress that "[t]he registration program has been decimated by budget cuts and early retirement packages and has forty-eight vacancies out of a staff of 180 experts. * * * The pendency time for processing registration claims is a source of constant concern." *Hearing on Oversight of the U.S. Copyright Office Before the Subcommittee on*

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[1] "The effective date of a copyright registration" is not the date of approval but rather the date that the "application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office." 17 U.S.C. 410(d).

Courts, Intellectual Property, and the Internet, Committee on the Judiciary U.S. House of Representatives, 113th Cong. 9 (2014) (Statement of Maria A. Pallante, Register of Copyrights and Director of the U.S. Copyright Office).[2]

Given chronic understaffing and budget cuts, processing times are far longer today than when the Act was passed. See U.S. Copyright Office, *Registration Processing Times*, https://www.copyright.gov/registration/docs/processing-times-faqs.pdf. But the Copyright Office offers expedited processing through which an author may obtain registration within a matter of days (typically five) in exchange for an additional fee. See U.S. Copyright Office, *Special Handling: (Circular 10)* 2 (2017).

c. Congress wanted to encourage registration for good reason. Registration provides multiple benefits to copyright owners, the public, and the copyright system, including the litigation process. See, *e.g.*, S. Rep. No. 352, 100th Cong., 2d Sess. 19 (1988); H.R. Rep. No. 7083, 59th Cong., 2d Sess. 8 (1907) (registration operates "[f]or the protection of the public itself").

Among other benefits, registration increases information available to the public, allows the Copyright Office to enforce other requirements of copyright law, gives authors a permanent record of their claims, expands the Library of Congress's collection of works, weeds out improper claims, and assists courts should litigation arise. See, *e.g.*, 1961 Report at 72-73; Benjamin Kaplan, *Study*

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[2] Petitioner highlights the average 309-day processing time from 2009. Br. 11-12. This cherry-picked statistic misleads through omission—that figure jumped from 81 days in 2007 due to a "steep learning curve following implementation of reengineered processes and new information technology systems." U.S. Copyright Office, *Annual Report of the Register of Copyrights* 47 (2009). By 2011, it had fallen back to 94 days. See U.S. Copyright Office, *Annual Report of the Register of Copyrights* 21 (2011).

No. 17: The Registration of Copyright 41-45 (1958) (the "Kaplan Study"); Dotan Oliar, Nathaniel Pattison & K. Ross Powell, *Copyright Registrations: Who, What, When, Where, and Why*, 92 Tex. L. Rev. 2211, 2216-2220 (2014) (discussing market-based advantages for authors to obtain registration). Because the registration process requires a deposit of the work, it supplies the Library of Congress with a substantial body of original works. *E.g.*, U.S. Copyright Office, *Fiscal 2017 Annual Report* 10 ("The Office forwarded more than 658,045 copies of works with a value of almost $41 million to the Library's collections in fiscal 2017.").

In Congress's view, early registration is important: "To be most useful and reliable as a source of information, registration should be made shortly after the first public dissemination of the work." 1961 Report at 74.

d. Although "registration is not a condition of copyright protection" (17 U.S.C. 410(a)), Congress provided multiple incentives for copyright owners to seek registration as early as possible. *E.g.*, S. Rep. No. 100-352 at 23. Most directly, Congress forbade suit to invoke the Act's remedies until "registration" "has been made" or "has been refused":

> [N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability

> of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.

17 U.S.C. 411(a). "A certificate of registration satisfies the requirements" of Section 411. 17 U.S.C. 411(b)(1).

A copyright owner who promptly seeks registration also gains additional potential remedies in an infringement lawsuit. Although statutory damages and attorney's fees are generally recoverable (see 17 U.S.C. 504, 505), they are disallowed for infringement before the "effective date" of registration. 17 U.S.C. 412. And the certificate of registration "constitute[s] prima facie evidence of the validity of the copyright and of the facts stated in the certificate" if the certificate is "made before or within five years after first publication of the work." 17 U.S.C. 410(c).

e. Although Congress created a variety of strong incentives to promptly seek registration, it also concluded that in some circumstances the burdens of pre-suit registration outweigh the benefits. And in those circumstances, carefully weighing the tradeoffs, Congress expressly softened the registration prerequisite.

First, the 1976 Act included a provision to address live broadcasts—where it is simply impracticable to make registration, and thereby engage the Act's protections, before transmission. See 17 U.S.C. 411(c). Under that provision, a copyright owner may sue without registration if she (1) notifies the infringer of the broadcast and of her "intention to secure copyright in the work"; and (2) "makes registration for the work * * * within three months after its first transmission." *Id.* This accommodation allows an injunction "to prevent the unauthorized use of the material included in the 'live' transmission." H.R. Rep. No. 94-1476 at 157.

Second, in 2005, Congress added a "preregistration" process to increase protection for "class[es] of works that the Register determines ha[ve] had a history of infringement" before publication. See 17 U.S.C. 408(f); Artists' Rights and Theft Prevention Act of 2005, Pub. L. No. 109-9, Tit. I, § 104(b), 119 Stat. 218, 222. Currently, the classes of works eligible for preregistration are: motion pictures, sound recordings, musical compositions, literary works, computer programs, and advertising or marketing photographs. See U.S. Copyright Office, *Preregister Your Work*, https://www.copyright.gov/prereg/.

Preregistration represented a compromise between representatives of record companies and motion picture studios, who wanted to eliminate entirely "the registration requirement in cases of pre-release infringement," and the Copyright Office, which resisted any weakening of the registration prerequisite. *Preregistration of Certain Unpublished Copyright Claims*, 70 Fed. Reg. 42,286, 42,286 (July 22, 2005); see, *e.g.*, Dotan Oliar & Nicholas Matich, *Copyright Preregistration: Evidence and Lessons from the First Seven Years, 2005-2012*, 55 Ariz. L. Rev. 1073, 1084-1086 (2013).

2. The Copyright Act of 1976 represented a hard-fought, wholesale revision of the copyright laws, and culminated from two decades of study. See H.R. Rep. No. 94-1476 at 47-48. Among other topics, registration alternatives were specifically—and heavily—studied. See, *e.g.*, Kaplan Study; Caruthers Berger, *Study No. 18: Authority of the Register of Copyrights to Reject Applications for Registration* (1959) (the "Berger Study"). As the enacted text shows, Congress ultimately retained a permissive

registration system, but one that encouraged copyright owners to seek registration as soon as possible.[3]

a. The Kaplan Study provided an overview of our country's copyright-law history and exhaustively surveyed the alternative registration schemes of other countries, including countries without "any official registration or recordation." Kaplan Study at 60; see also *id.* at 40 (policymakers must "ask what are the benefits and countervailing disadvantages or demerits of a registration scheme on the present American lines").

It concluded by raising several policy questions that would need to be resolved (*id.* at 64) and remarking that because the United States was likely to retain optional registration, "there will be particular need" to provide "incentives and sanctions * * * to bring about the desired registration." *Id.* at 65.

The Berger Study expressly addressed the effect of registration and its refusal. Berger Study at 94-98. It discussed the "unsettled question" "whether a claimant who has fulfilled the procedural requirements (deposit, application, and fee) for registration but has been refused registration on the ground that the copyright claim is invalid, must first secure registration by a mandamus action against the Register before he can maintain a suit for infringement; or whether he may sue for infringement without registration and have the validity of his claim determined in that suit." *Id.* at 97.

The Berger Study noted that the Register's refusal has value for the public and courts: it "serves to inform applicants and the public of the scope of the copyright law" and assists "courts insofar as they give weight to the

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[3] These studies were two of many that Congress funded to address "most of the major substantive issues in copyright revision." H.R. Rep. No. 94-1476 at 1.

probative value of registration and the interpretation of the law by the Copyright Office." *Id.* at 95. The study therefore concluded by framing one of the main questions for debate as: "Should registration, *or application therefor*, be a prerequisite to an action for infringement?" *Id.* at 98 (emphasis added).

b. Building on these studies, the Copyright Office reported recommendations to Congress. See 1961 Report at iii-iv. Regarding the broad question whether registration should be mandatory or optional, the Office suggested a compromise under which "registration should not be required to sustain a copyright * * * , but that strong inducements to make registration within a reasonable time should be provided." *Id.* at 73. Regarding "[r]egistration as a prerequisite to suit," the Office recommended retaining "the requirement of registration" because "the registration process identifies unfounded claims and assists the courts in establishing presumptive facts and applying the law." *Id.* at 75.

But the Office also recommended "one important modification" (*ibid.*)—the Office endorsed a system in which either registration *or refusal* was sufficient to permit suit. Specifically, the Office recommended a partial reversal of Judge Learned Hand's ruling in *Vacheron & Constantin Le Coultre Watches, Inc.* v. *Benrus Watch Co.*, 260 F.2d 637 (2d Cir. 1958). *Vacheron* held that the prior law required "acceptance by the Register" before suit could be filed. 260 F.2d at 641. Thus, according to *Vacheron*, the law prohibited suit "when the Register of Copyrights had refused" the claim. *Id.* at 639. The copyright owner instead had to first seek mandamus to reverse the Register's refusal.

The Office agreed with Judge Hand that the current law required acceptance by the Register before suit, but it described *Vacheron* as "unfortunate" for requiring a

copyright owner to first seek mandamus while infringement might "continue[]." 1961 Report at 75. Accordingly, "[w]here a claimant has deposited the required copies, application, and fee, and registration has been refused, * * * he should be entitled to maintain a suit against an infringer." *Ibid.*

c. Congress followed the Office's recommendations. As the House and Senate Committee Reports explain, the first sentence of the revised Section 411(a) "restates the present statutory requirement that registration must be made before a suit for copyright infringement is instituted." H.R. Rep. No. 94-1476 at 157. The second and third sentences, however, "alter the present law as interpreted in *Vacheron*" to permit suit by "a rejected claimant who has properly applied for registration" so that she may challenge the registration issue as part of the infringement suit and without mandamus. *Ibid.*

The enacted text accordingly makes Congress's ultimate choice clear. Faced with three basic options—mandatory registration, no registration system at all, or optional registration with inducements—Congress settled on the middle ground, making registration permissive but providing incentives to seek registration as early as possible, including making registration a prerequisite to suit.

3. Since 1976, Congress has repeatedly considered weakening the registration system, but each time it has retained registration as a prerequisite to suit.

First, the Berne Convention Implementation Act of 1988 amended the copyright laws to enable the United States to adhere to the Berne Convention for the Protection of Literary and Artistic Works, an international copyright-relations treaty. S. Rep. No. 100-352 at 2. The Berne Convention requires the elimination of copyright "formalities" for foreign authors. S. Rep. No. 100-352 at 11. The committee report extensively discussed whether

Section 411(a)'s registration prerequisite imposed an impermissible formality, along with reviewing the costs and benefits of such a prerequisite. *Id.* at 11-26. Congress ultimately exempted foreign authors—hence the limitation in Section 411(a) to "United States works." Pub. L. No. 100-568, § 9(b)(1), 102 Stat. 2853, 2859. But, conspicuously, Congress maintained the requirement for U.S. authors.

Second, the Copyright Reform Act of 1993 would have eliminated the registration requirement entirely, replacing it with a requirement to "submit[] an application for registration." H.R. Rep. No. 388, 103d Cong., 1st Sess. 4 (1993). This amendment "intended to eliminate the last significant vestiges of the formality-based approach to United States copyright law." *Id.* at 9. It was not enacted.

Third, as noted above, in 2005 Congress enacted the preregistration system as a compromise to placate some copyright owners who advocated eliminating the registration prerequisite.

B. Procedural History

1. Petitioner Fourth Estate is an independent news organization that licenses its journalism to other outlets. Pet. App. 15a-16a. Petitioner alleges that Wall-Street.com obtained a license to distribute petitioner's work, but then continued distributing that work after the license expired. *Id.* at 16a. Petitioner sued Wall-Street.com for copyright infringement "immediately" after filing an application for copyright registration with the Copyright Office. *Id.* at 18a. Because the Register had not yet acted on petitioner's application, the district court dismissed the suit under Section 411(a). *Id.* at 13a.

2. A unanimous Eleventh Circuit panel affirmed, joining the Tenth Circuit in requiring the Register to act on a copyright holder's application before suit may be filed. See *La Resolana Architects, PA* v. *Clay Realtors Angel*

Fire, 416 F.3d 1195, 1197 (10th Cir. 2005), abrogated in part on other grounds by *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154 (2010); but see *Cosmetic Ideas, Inc.* v. *IAC/Interactivecorp*, 606 F.3d 612 (9th Cir. 2010) (adopting the application approach); *Positive Black Talk Inc.* v. *Cash Money Records Inc.*, 394 F.3d 357, 365 (5th Cir. 2004) (same), abrogated in part on other grounds by *Reed Elsevier*, 559 U.S. 154.

The Eleventh Circuit held that "the text of the Copyright Act makes clear that the registration approach * * * is correct." Pet. App. 6a. The court reasoned that the "Copyright Act defines registration as a process that requires action by both the copyright owner and the Copyright Office." *Ibid.* The application approach, in contrast, renders meaningless numerous provisions detailing the Register's role in this process. Because the court found the Act's plain language unambiguous, it declined to consider petitioner's policy and legislative history arguments.

3. After the Eleventh Circuit's mandate had issued, the Register refused registration of the articles that respondents had allegedly infringed, explaining that petitioner's "submission does not meet the legal or formal requirements for registration under * * * any * * * application option currently available." U.S. Br. App. 3a. Petitioner had submitted the articles for registration as a "group database."[4] But because there was "no original selection, coordination, and/or arrangement authorship evident in the registration materials," petitioner's "submission is not eligible for registration [as a] group database,

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[4] According to petitioner, it typically seeks "group registration for databases containing the same type of material at issue here" (Br. 16), rather than seeking registration of the underlying articles as works of original, copyrightable journalism.

* * * as a compilation generally, or as a collective work." U.S. Br. App. 8a.

SUMMARY OF ARGUMENT

This case involves a simple question of statutory interpretation. When Congress provided that a copyright-infringement suit may not "be instituted until * * * registration of the copyright claim has been made" (17 U.S.C. 411(a)), did Congress mean that *applying for* registration was the same thing as *making* registration? As the text, structure, history, and purpose of Section 411(a) all make obvious, it did not.

I.1. This Court's analysis can and should begin and end with the text of Section 411(a). That provision does not say a claimant may file an infringement action upon applying for registration. It says she may do so only once "registration * * * has been made" or "registration has been refused." 17 U.S.C. 411(a). It takes no special powers of divination to understand the meaning of these sentences: the Register's approval or disapproval is needed before suit may be brought.

That is confirmed by the ordinary meaning of "registration"—*i.e.*, "recording" or "inserting in an official register." *Black's Law Dictionary* 1449 (revised 4th ed. 1968). A claim cannot be inserted in an official register without the Register's approval. Nor can anyone but the Register refuse to insert a claim in an official register.

If the text of Section 411(a) weren't enough, the structure of the Act likewise makes clear that action by the Register is necessary before suit may be filed. It is beyond dispute that the process of copyright registration is outlined in the three provisions immediately preceding Section 411(a). First, Section 408 says a copyright owner "may obtain registration of the claim by delivering [an ap-

plication and supporting materials] to the Copyright Office." Next, Section 409, titled "Application for copyright registration," sets out the material to be included in the application. And finally, Section 410, titled "Registration of claim and issuance of certificate," explains the circumstances under which "the Register shall register the claim" (17 U.S.C. 410(a)) and the circumstances under which "the Register shall refuse registration" (17 U.S.C. 410(b)).

The two possible outcomes under Section 410—registration or refusal—map perfectly onto the requirements of Section 411(a). It is unquestionably "the *Register*" who "shall register" or "refuse registration" under Section 410. 17 U.S.C. 410 (emphasis added). So too in Section 411(a); the Register's role in registering or refusing a claim does not somehow vanish from one provision to the next.

In short, to resolve this case, the Court need only read the words of the statute and give them their ordinary, common-sense meaning. Doing so permits one result: "registration" requires registration, not just application.

2. Petitioner's approach takes this simple exercise and tortures it. Rather than reading the words of Section 411(a) and giving them their natural meaning, petitioner bends over backwards to read "make registration" to mean "apply for" registration.

Petitioner does so based on a search through the Copyright Act that seems to look everywhere but Section 411(a) itself. Indeed, other than a single sentence at the outset of its argument (Br. 22), petitioner analyzes no fewer than *seven* other provisions of the Copyright Act before turning to Section 411(a)'s text (Br. 22-29). And at no point in its brief does petitioner even quote the two operative sentences of Section 411(a) together. This attempt to direct the Court's attention everywhere *but* Section

411(a) is little wonder: the ordinary meaning of that provision precludes petitioner's wishful reading.

But it is not just ordinary meaning that petitioner's approach offends; the application approach would also render numerous provisions of the Copyright Act—including part of Section 411(a) itself—meaningless. To give just one example: if petitioner were correct that "making" registration is the same as "delivering the deposit, application, and fee required for registration," then the second sentence of Section 411(a) would effectively read: "In any case, however, where *registration has been made* and *registration has been refused*, [suit may be filed]." In other words, under petitioner's approach, the statute descends into incoherence and contradiction.

II. The history of the Copyright Act confirms respondents' common-sense interpretation. In passing the 1976 revision, Congress exhaustively considered *whether* to make registration a prerequisite to suit, but it never questioned what that requirement entails. Congress expressly recognized, for example, that Judge Hand's decision in *Vacheron*, 260 F.2d at 640-641 (holding that "acceptance by the Register" was a prerequisite to suit), articulated the background law upon which it was legislating.

Although Congress partially abrogated *Vacheron* by permitting suit if the Register refuses registration, it explained that "[u]nder the bill, *as under the law now in effect*, a copyright owner who has not registered his claim * * * cannot enforce his rights in the courts." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 157 (1976) (emphasis added); S. Rep. No. 473, 94th Cong., 1st Sess. 139 (1975); see also H.R. Rep. No. 1476 at 157 (recognizing that "[t]he second and third sentences of [S]ection 411(a) would alter the present law as interpreted in *Vacheron*" by permitting the claimant to file suit after the Register refuses regis-

tration, rather than having to first mandamus the Register). The Act's history thus confirms that Congress required action by the Register—not mere application—before suit may be filed.

III. At bottom, petitioner is attacking Congress's policy judgment of how to balance the various incentives surrounding registration. Although petitioner tries to cram its argument into a statutory-interpretation framework, its true aim is a significant policy change—the relaxation of the registration requirement. But Congress exhaustively considered, over the course of two decades, the various intricacies of a registration system, and it plainly made *registration*, not an application for registration, a prerequisite to suit. In the policymakers' considered judgment, that prerequisite was the better way to encourage copyright owners to seek registration as early as possible.

Tellingly, the driving force behind petitioner's position is the length of time it takes the Register to process copyright claims. But, as petitioner effectively concedes (Br. 42 & n.28), processing times were substantially shorter when Congress passed Section 411(a). Although lack of funding and an increased workload have since increased those times, the meaning of statutory text does not change with the vagaries of congressional funding.

Petitioner wishes it could file suit before obtaining registration and that the Copyright Office were more efficient. Those may be reasonable desires, but they have nothing to do with the meaning of the words that Congress selected. Section 411(a) demands that a copyright owner await the Copyright Office's decision before filing suit. If circumstances have changed such that the burden on copyright owners of awaiting registration now outweighs the benefit to the public of a robust registration system, Congress can rewrite the law. This Court's task, however, is different: it must apply the law that Congress

has already written. Under that standard, the court of appeals' judgment should be affirmed.

ARGUMENT

I. THE COPYRIGHT ACT CLEARLY REQUIRES THE REGISTER OF COPYRIGHTS TO APPROVE OR REFUSE A CLAIM BEFORE AN INFRINGEMENT SUIT MAY BE BROUGHT

This Court begins any statutory interpretation case with the relevant enacted text. See, *e.g.*, *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016). To be sure: petitioner pays lip service to that axiom, beginning its argument by asserting that "the phrase 'registration . . . has been made' in § 411(a) refers to the actions of the copyright owner in submitting the deposit, application, and fee required for registration, not to a later determination by the Register." Br. 21. Tellingly, however, petitioner fails to quote the two operative sentences of Section 411(a) together *at any point* in its 11-page statutory analysis. See Br. 21-32. Those sentences provide:

> [N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights.

17 U.S.C. 411(a).

Petitioner shuns that text for good reason. The relevant phrase ("registration of the copyright claim has been

made in accordance with this title") has an obvious, common-sense meaning: the recording of a copyright by the Register after examining a properly filed application. The application approach urged by petitioner reflects a policy preferred by some stakeholders—such as its *amici*. But, as the text of the Copyright Act makes clear, it is a policy that was *rejected* by Congress.

A. The Unambiguous Text Of Section 411(a) Forecloses Petitioner's Application Approach.

When analyzing statutory text, this Court gives "each word its 'ordinary, contemporary, common meaning.'" *Star Athletica, LLC* v. *Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (citation omitted). When the "'language is plain,'" "that 'is also where the inquiry should end.'" *Franklin Cal.*, 136 S. Ct. at 1946 (citation omitted).

1. a. Begin with the ordinary meaning of the term "registration." Cf. *Life Techs. Corp.* v. *Promega Corp.*, 137 S. Ct. 734, 739 (2017) (using dictionary definitions to determine "ordinary meaning" of undefined term in the Patent Act). That word connotes official action by the government and thus requires registration *by the Register*.

At the time of the Copyright Act's enactment, "registration" meant "[r]ecording" or "inserting in an official register." *Black's Law Dictionary* 1449 (revised 4th ed. 1968); see also, *e.g.*, *Webster's Third New International Dictionary* 1912 (1971) ("an act or the fact of registering"; "something registered"). Only the Register can "record[]" the claim or "insert[]" it "in an official register." The copyright owner's application represents one, earlier step in the process. But registration cannot actually be "made" until the Register approves. See, *e.g.*, *Freeman* v. *Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012) ("[I]t is normal usage that, in the absence of contrary indication, governs our interpretation of texts.").

b. The second sentence of Section 411(a) removes any conceivable doubt about the meaning of the first. It provides that where the application has been delivered and "registration has been refused, the applicant is entitled to institute" suit. 17 U.S.C. 411(a).

As this Court has explained, this second sentence of Section 411(a) permits suits "involving *unregistered* works * * * where the holder attempted to register the work and registration was refused." *Reed Elsevier*, 559 U.S. at 165 (emphasis added). The second sentence thus constitutes an exception to the registration prerequisite—not, as petitioner contends, "a subset of those cases where "'registration * * * has been made'" (Br. 30). See S. Rep. No. 100-352 at 13-14 & n.2 ("Section 411(a) contains an *exception* in the case of a work as to which the copyright proprietor has *sought* to register a claim, but the Copyright Office has refused to issue a certificate of registration." (emphases added)). The second sentence of Section 411(a) also provides critical context for the first. Petitioner cannot but concede that it is the Register who "refuses" registration. It is thus only natural that it is the Register who "makes" registration as well. One way or another, the Register must act before suit may be filed.

c. That common-sense interpretation is reinforced by the requirement that registration be made "in accordance with this title." 17 U.S.C. 411(a). For a valid registration, Title 17 demands actions not only by the copyright owner but also by the Copyright Office.

The process of copyright registration is set forth in the three consecutive provisions immediately preceding Section 411(a). First, Section 408 says a copyright owner "may obtain registration of the claim by delivering [an application and supporting materials] to the Copyright Office." Next, Section 409, titled "Application for copyright registration," sets out the material to be included on "[t]he

application for copyright registration." And finally, Section 410, titled "Registration of claim and issuance of certificate," explains the circumstances under which "the Register shall register the claim" (17 U.S.C. 410(a)) and those circumstances under which "the Register shall refuse registration" (17 U.S.C. 410(b)). See *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) ("Although section headings cannot limit the plain meaning of a statutory text, 'they supply cues' as to what Congress intended" (citations omitted)).

The two possible outcomes under Section 410 map directly onto Section 411(a). It is unquestionably "the Register" who "shall register" or "refuse registration" under Section 410. 17 U.S.C. 410. That does not somehow change in Section 411(a), the very next provision. Thus, while suit is permissible regardless of how the Register acts—*the Register must act.*[5]

2. Petitioner makes a clever but specious attempt to reconcile the second sentence of Section 411(a) with its application approach. See Br. 29-32. According to petitioner, "registration" is "made" in the first sentence of Section 411(a) upon delivery of the application materials. If "registration" is subsequently "refused," petitioner argues, the second sentence demands only that the plaintiff notify the Copyright Office of the infringement suit. Br. 30. In other words, the second sentence merely "imposes" "an additional requirement" where the Register ultimately refuses registration. *Ibid.* Petitioner's reading is indefensible.

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[5] Petitioner argues (at 22) that the caveat "in accordance with this title" "turns on" solely *the copyright owner's* "compli[ance]" with the Copyright Act. But registration requires more than the owner's actions; it does not occur until the Register approves and "register[s] the claim." 17 U.S.C. 410(a). Petitioner has no basis for excising Section 410 fr m "this title."

a. As an initial matter, petitioner's proposed reading of the phrase "registration has been made" in the first sentence of Section 411(a) would render the second sentence incoherent. In petitioner's view, the phrase "registration has been made" in the first sentence has the same meaning as the phrase "the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form" in the second. Br. i. The two phrases should accordingly be interchangeable. But substituting "registration has been made" into the second sentence of Section 411(a) would render that sentence incomprehensible:

> In any case, however, where ~~the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form~~ *registration has been made* and registration has been refused, the applicant is entitled to institute a civil action for infringement.

It hardly bears noting that registration cannot be both made *and* refused. Petitioner's reading would accordingly make Section 411(a) internally incoherent.

Petitioner's view also creates a second contradiction: registration could only ever be "refused" *after* it had already been "made." Registration, in petitioner's view, is "made" upon application, and application by necessity occurs before refusal. But how can registration be refused once it has been made?

b. Petitioner can avoid this conundrum only by assigning two different meanings to the word "registration" in Section 411(a)'s first and second sentences. In the first sentence, "registration" would connote actions of the copyright owner alone, yet in the second sentence petitioner concedes that "registration" involves the Register, who "shall refuse registration" when "the material deposited does not constitute copyrightable subject matter or * * *

the claim is invalid for any other reason." 17 U.S.C. 410(b). The Court should not interpret "registration" in consecutive sentences, linked by the word "however," to both include *and* exclude the Register's actions. See *Hall* v. *United States*, 566 U.S. 506, 519 (2012). Petitioner cannot untangle this knot by equating "registration" with the "deliver[y] [of] the required application, deposit, and fee" (Br. i) because the Register is not refusing that delivery; she is determining that the copyright claim represented by that application is invalid. 17 U.S.C. 410(b).

c. Petitioner's approach would also render the second sentence of Section 411(a) superfluous. If an application entitles a copyright owner to sue under the first sentence, then the owner has the right to sue regardless of the Register's action. There would be no need to provide an "entitle[ment] to institute" suit should the Register later "refuse" registration.

Petitioner's interpretation of Section 411(a) therefore violates the full panoply of cardinal principles of statutory construction—that statutory language should be read for coherence, not incoherence; that identical words should carry identical meanings, not different ones; and that statutes should be read to give effect to all provisions, not render them superfluous. These principles should hold particular force in interpreting *consecutive*, *linked* sentences appearing in the *same* provision. And petitioner's approach offends them all.[6]

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[6] On top of these fatal defects, petitioner's reading of Section 411(a) suffers still another critical flaw—it defies the ordinary meaning of the second sentence's language. The text contemplates that the sequence of events entails first the refusal of registration, *then* filing suit: "where * * * registration *has been refused*, the applicant is entitled to *institute* a civil action for infringement." 17 U.S.C. 411(a)

3. At the end of the day, the best reading of the statute is the obvious one: suit may not be "instituted" until the Register has "made" or "refused" registration. And that, indeed, is how this Court, Congress, and the Copyright Office have *all* interpreted Section 411(a). For example:

This Court characterized the second sentence of Section 411(a) as involving "*unregistered*" claims and allowing suit "where the holder *attempted* to register the work and registration was refused." *Reed Elsevier*, 559 U.S. at 165 (emphases added).

Congressional committee reports have similarly observed: "until the Register of Copyrights has determined that" the claim should be registered, "judicial enforcement of the claim to copyright cannot be obtained." S. Rep. No. 100-352 at 14; see also H.R. Rep. No. 103-388 at 11 (describing Section 411(a) as a "requirement that a registration or refusal to register be obtained from the Copyright Office before an action for infringement be obtained").

And the considered view of the Copyright Office is that "[t]he mere submission of an application to the U.S. Copyright Office does not amount to a registration." U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 625.5 (3d ed. 2017) (the "Compendium"); see

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(emphasis added). A copyright owner thus may not institute suit before refusal. See 5 William F. Patry, *Patry on Copyright* § 17:78 (2017) (observing that the Copyright Act of 1976 "changed [the operative verb from] 'maintained' to 'instituted' in order to make as clear as possible" that the Register's action must come before suit is filed).

Petitioner nonetheless maintains that refusal can come before or after suit begins, because petitioner sees "no time limit on service of the complaint." Br. 31. That is a non-sequitur. The question of when service must be made to comply with Section 411(a)'s second sentence is distinct from—and entirely unrelated to—the question of whether the Register's refusal must come before suit is instituted.

also, *e.g.*, U.S. Copyright Office, *General Guide to the Copyright Act of 1976* 11:9 (1977) ("The new law also provides that a *rejected* claimant who has properly applied for registration may *bring* an infringement suit if he serves notice on the Register, thus allowing the Register to intervene in on the issue of registrability." (emphases added)), https://www.copyright.gov/reports/guide-to-copyright.pdf; cf., *e.g.*, *Inhale, Inc.* v. *Starbuzz Tobacco, Inc.*, 755 F.3d 1038, 1041-1042 (9th Cir. 2014) (according deference to the Compendium under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944)); *Olem Shoe Corp.* v. *Wash. Shoe Corp.*, 591 F. App'x 873, 882 n.10 (11th Cir. 2015) (same).

Those sources take Congress to mean what it says. An application for registration is not registration, and registration is not made until the Register registers the claim. Petitioner's contrary view can be squared neither with these sources nor with the text of Section 411(a).

B. Many Other Provisions In The Act Foreclose Petitioner's Application Approach.

Even if petitioner's view could somehow be reconciled with Section 411(a), other parts of the Copyright Act preclude petitioner's effort to interpret "registration" to mean "application for registration." See *Star Athletica*, 137 S. Ct. at 1010.

1. Petitioner's approach would impermissibly eviscerate multiple provisions in the Copyright Act. See, *e.g.*, *Clark* v. *Rameker*, 134 S. Ct. 2242, 2248 (2014) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." (citation omitted)).

Section 411(b), for example, provides that "[a] certificate of registration satisfies the requirements of this section." 17 U.S.C. 411(b). If an application for registration suffices to satisfy Section 411(a), there would be no reason

for Section 411(b)'s existence. Anytime the Register issued a certificate of registration, the application would have already satisfied Section 411(a). Constructions that create this type of surplusage should be avoided. See, *e.g.*, *La Resolana*, 416 F.3d at 1203 (application approach would make the examination requirement meaningless).[7]

So, too, would petitioner's view render unnecessary the relation-back provision of 17 U.S.C. 410(d). Because seeking registration does not constitute registration, Section 410(d) establishes that "[t]he effective date of a copyright registration" is not the date that registration is "determined * * * to be acceptable for registration," but "the day on which an application, deposit, and fee" is "received in the Copyright office." 17 U.S.C. 410(d). Were registration complete upon application, Section 410(d) would be pointless.

Finally, Section 408(f)'s preregistration system would have little "practical effect" under petitioner's approach. *TRW Inc.* v. *Andrews*, 534 U.S. 19, 29 (2001) (asking whether party's interpretation "would in practical effect render [an] exception entirely superfluous in all but the most unusual circumstances"); see *id.* at 31. Preregistration allows authors of certain works to pursue judicial remedies before their works have been registered. 17 U.S.C. 408(f); 37 C.F.R. 202.16. But if a copyright owner need not wait for the Register to act, the owner would rarely, if ever, need to avail herself of preregistration; she would simply apply for regular registration, then immediately sue.

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[7] It is no answer that this provision does not become superfluous because the certificate would provide proof that the owner delivered the application material to the Copyright Office. The owner would use the certificate in vanishingly few situations, and the Court avoids interpretations that render provisions "insignificant, [even] if not wholly superfluous." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001).

Notably, the preregistration system resulted from some copyright owners urging Congress to "remove the registration requirement in cases of pre-release infringement." *Preregistration of Certain Unpublished Copyright Claims*, 70 Fed. Reg. 42,286, 42,286 (July 22, 2005); see *id.* ("Copyright owners persuaded Congress that the existing rules making registration a prerequisite for suit for infringement * * * are unduly burdensome on plaintiffs seeking relief against pre-release infringement in civil suits for copyright."). Congress instead developed preregistration to alleviate these concerns. Petitioner, by contrast, would interpret Section 411(a) to go much further and allow suit merely on filing an application.[8]

2. Petitioner's approach also fails to recognize that Congress knew how to specify *applying* for registration when it wanted to. Indeed, multiple provisions in the Copyright Act distinguish between registration and the application therefor.

For example, Section 408(a) provides that a copyright owner "may obtain registration" "by delivering" the application, deposit, and fee. 17 U.S.C. 408(a). One "obtains" something from someone else. If registration were made upon "deliver[y]" of the application, deposit, and fee, there would be no further "registration" to obtain.

And Section 408(f) *expressly* distinguishes between registration and application for registration. A person who files an infringement action under Section 408(f) must "appl[y] for registration of the work" within

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[8] Petitioner's view would create an additional strange result. If "registration" is "made" when an author applies for registration, then "preregistration" must be "made" when an author applies for preregistration, because "made" cannot mean two things "at the same time." *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005). But keying preregistration to delivery of the preregistration application would undermine the Register's preregistration determination.

"3 months after first publication." 17 U.S.C. 408(f)(3) (emphasis added). Moreover, if petitioner's interpretation of Section 411(a) is correct, then either "registration" means two different things in these provisions, or Section 408(f)(3) reads absurdly as requiring an "application for application for registration."

The same is true of the last clause in 17 U.S.C. 409: "If an application is submitted for the renewed and extended term provided for in section 304(a)(3)(A) and an original term registration has not been made, the Register may request information with respect to the existence, ownership, or duration of the copyright for the original term." Cf. H.R. Rep. No. 94-1476 at 156 ("The various clauses of section 409, which specify the information to be included in *an application for copyright registration*, are intended to give the Register of Copyrights authority to elicit all of the information needed to *examine the application and to make a meaningful record of registration*." (emphases added)).

3. Finally, petitioner's approach would make nonsense of the Copyright Act's constructive-notice provisions, which plainly contemplate the Register's actions as part of "registration" being "made."

In 17 U.S.C. 205, Congress imposed constructive notice for transfers of copyright ownership recorded in the Copyright Office, provided certain conditions are met. 17 U.S.C. 205(a), (c). One of those conditions is that "registration has been made for the work." 17 U.S.C. 205(c). Without registration *by the Copyright Office*, providing for constructive notice would make no sense—there is no good reason to charge a person with constructive notice as of the day a copyright owner delivers application materials, when that person would have no reason to know that such delivery had occurred. Cf. 17 U.S.C. 705 (requiring

the Register to "open to public inspection" "records of deposits, registrations, recordations").

17 U.S.C. 406 gives infringers a "complete defense" to infringement in certain circumstances where the infringer "was misled by the copyright notice," 17 U.S.C. 406(a), but that defense is unavailable if the infringing conduct began before "registration for the work had been made," 17 U.S.C. 406(a)(1). Again, it makes no sense to undercut the defense based on the occurrence of an event—delivery of application materials—that the innocent infringer had no reason to know.[9]

C. Petitioner's Reliance On The Phrase "Makes Registration" Is Misplaced

There can be little doubt that the Register registers copyright claims. Petitioner's approach eschews this obvious meaning in favor of a scavenger hunt through the Copyright Act, searching for language that it thinks is ambiguous enough to obfuscate the issue. But this is ultimately an exercise in hiding the ball.

Petitioner indeed obscures the very position for which it is advocating, laboring mightily to avoid calling it the "application" approach, even though that is the common nomenclature. See, *e.g.*, ABA Br. 3; Int'l Trademark Ass'n Br. 7; Copyright Alliance Br. 3-4. Petitioner, unlike some

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[9] Petitioner responds that the defense disappears upon delivery under either the application approach or the registration approach because, petitioner claims, the petitioner loses the defense as of "the 'effective date of a copyright registration.'" Br. 25 (quoting 17 U.S.C. 410(d)). Petitioner again strays from the text. Unlike some provisions that sensibly incorporate the effective date under Section 410(d), Section 406(a)(1) instead pegs its operation exactly to when registration is made—and for good reason, given the logic of constructive notice. Compare, *e.g.*, 17 U.S.C. 412 (allowing statutory damages backdated to "the effective date"); *infra* at 32-33.

of its *amici*, likely recognizes the jarring disconnect between equating "registration" with "application."

But attempt to equate them it does. Petitioner seizes on the phrase "make registration" (and its passive-voice counterpart), which petitioner says "refer to the action of the copyright owner and not to the action of the Copyright Office." Br. 21. That contention flouts the ordinary meaning of that phrase and misconstrues the provisions in which it is used.

1. Petitioner's position rests on the idea that there is a material difference between the phrase "make registration" and the term "register." Petitioner again runs headlong into the words' plain meaning.

The term "make registration" is essentially equivalent to the verb "register": "When 'make' is paired with a noun expressing the action of a verb, the resulting phrase is 'approximately equivalent in sense' to that verb." *Janus Capital Grp., Inc.* v. *First Derivative Traders*, 564 U.S. 135, 142 (2011) (quoting 6 Oxford English Dictionary 66 (def. 59) (1933)); cf. *Reves* v. *Ernst & Young*, 507 U.S. 170, 177 (1993) (where statute used same word twice as a noun and a verb, explaining that "it seems reasonable to give each use a similar construction").

Yet petitioner concedes that "the Copyright Office 'register[s] [a] claim.'" Br. 19 (quoting 17 U.S.C. 410(a)) (alterations in original). "Make registration" accordingly has no special meaning. The Register, naturally, plays a necessary part in registering claims; so, too, does she play a necessary part in making registration.

2. To the extent that "make registration" (or its variants) in any part of the statute incorporates actions of the copyright owner, that does not mean the Register plays no part.

Registration is not "made" until the claim is formally recorded or inserted. Again, the ordinary meaning of

"make" shows why: "To cause to exist" or "To form, fashion, or produce; to do, perform, or execute." *Black's Law Dictionary* 1107; see, *e.g.*, *Webster's Third New International Dictionary* 1363 (1971) (defining "make" as "to cause to exist, occur, or appear: to bring to pass" or "to cause to be or become" or "to carry out (an action indicated or implied by the object)").

A claimant has not "produced" registration or "caused it to exist" until the Register registers the claim. Cf. *Webster's Third New International Dictionary* 1912 (1971) (defining "register" as "to make or *secure* an official entry of in a register" (emphasis added)).

Given the ordinary meaning of these words, it is unsurprising that petitioner's purported distinction between "make registration" and "registration" fails on its own terms. For instance, as discussed above, the constructive-notice provisions of 17 U.S.C. 205 and 406 use variants of "make registration" that *necessarily* incorporate the Register's actions. And as petitioner itself recognizes, in 17 U.S.C. 708(a), the phrase "'registration is made' is used to mean 'registration is granted by the Copyright Office.'" Br. 27.

The bulk of petitioner's brief is therefore devoted to proving a proposition that does not matter, namely, that the statute or some other source refers to the copyright owner registering a claim. The "flexibility" in the word "registration" (Br. 28) reflects only that it can take different entities as subjects in a sentence. But under that word's ordinary meaning and as it is used throughout the Act, it necessarily includes the Register's approval.

These principles demonstrate why petitioner's university class-registration hypothetical (Br. 28) is ill-conceived. True enough, a student might fill out the registration form online and tell a friend that she "registered" for classes; but if she receives a notice from the university

registrar informing her that she did not get into a course, the student would not still tell the friend that she "registered" for that class. Rather, she would say she had *tried* to register. Registration is not "complete" (Br. 28) until accepted. This Court spoke in similar terms in *Reed Elsevier*, explaining that Section 411(a) allows suit "where the holder *attempted to register* the work and registration was refused." 559 U.S. at 165 (emphasis added). If delivering the application *accomplished* registration, there would be more than a mere "attempt[]" to register.

D. Petitioner's Scavenger Hunt Through The Act Is Unavailing At Every Turn

Petitioner nonetheless attempts to justify its strained "make"-means-"apply for" reading by scouring the Act for provisions purportedly restricting "registration" being "made" to the copyright owner's acts alone. But as respondents detail below, petitioner flouts the plain text of those provisions in each and every instance. Indeed, however many provisions petitioner asks this Court to wade through—however far from Section 411(a) petitioner strays—it simply cannot avoid the plain meaning of Section 411(a)'s text.

1. Petitioner first cites 17 U.S.C. 412, which allows statutory damages if "registration is made within three months after the first publication of the work." Petitioner argues that Section 412 must refer solely to an application because the Register's action "may be delayed due to no fault of the copyright owner." Br. 24.

Petitioner misreads the statute, which conditions statutory damages on "the effective date of [the work's] registration": Statutory damages are unavailable for "any infringement of copyright commenced after first publication of the work and before the *effective date of its registration*, unless *such registration* is made within three months after the first publication of the work." 17 U.S.C.

412(2) (emphases added). The modifier "such" shows that the statute is referring to registration with an "effective date" "within three months after first publication." *Ibid.* And under Section 410, the "effective date" is keyed to the copyright owner's actions, not the Register's. Petitioner's complaint about respondents' reading interfering with this "grace period" (Br. 24)—because the Register might wait more than three months to act—thus rings hollow.[10]

In any event, petitioner's argument about Section 412 is another that fails on its own terms. The only reason petitioner offers for Section 412 to support its interpretation is that "the Copyright Office may—and usually does—act later" than the three-month window. Br. 24. But at the time of the Copyright Act's enactment, the Copyright Office usually acted within that window. See *supra* at 4; *infra* at 48. How quickly petitioner's argument about Section 412 would disintegrate if the Copyright Office, with the help of more funding, had maintained its historic efficiency. Cf., *e.g.*, Br. 42 & n.28; *supra* at 4 (noting that additional staff members, added via a copyright fee increase authorized by Congress, spurred the Office to cut processing time for routine claims from 12 weeks to 6).

Petitioner's Section 412 argument is thus emblematic of the fundamental flaw in its position: the meaning of words don't change based on congressional funding. Yet petitioner's primary attack on the registration approach is that it cannot be squared with the delay in processing claims. If the Office is not as quick as it once was, that is a concern for Congress—not this Court.

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[10] Even petitioner does not think its argument holds water. Elsewhere petitioner admits that Section 412 "expressly authorizes [statutory damages] for infringement after the 'effective date' of registration." Pet. 25 n.19 (emphasis added). Any delay from the Register is thus irrelevant under petitioner's own view.

2. Petitioner next discusses Section 411(c), which allows copyright owners to obtain pre-broadcast injunctions against potential infringement of live broadcasts, but requires "the copyright owner" to "make[] registration for the work * * * within three months after its first transmission." 17 U.S.C. 411(c)(2).[11]

Petitioner emphasizes that Section 411(c)(2) uses the "active-voice construction[] with 'the copyright owner' as the subject." Br. 22. Petitioner infers from that grammatical construct that registration results from the copyright owner's acts alone. But that conclusion does not follow. As discussed *supra* at 30-31, registration is not "made"—*i.e.*, secured—until the Register has "insert[ed]" the claim "in [the] official register." *Black's Law Dictionary* 1449 (revised 4th ed. 1968); see, *e.g.*, 17 U.S.C. 410. Petitioner's contrary view again contravenes the ordinary meaning of these words.[12]

The exceptional nature of Section 411(c)'s remedies shows there is good reason that Congress insisted that the Register act and thereby complete registration. Section 411(c) "deals with the special situation presented by

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[11] The relevant text of Section 411(c):

> In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement * * * if * * * the copyright owner—
>
> (1) serves notice upon the infringer * * *; and
>
> (2) makes registration for the work, if required by subsection (a), within three months after its first transmission.

17 U.S.C. 411(c).

[12] Section 411(c) likely makes the copyright owner the subject for ease of drafting—"copyright owner" is the subject for both (c)(1) and (2), and the action in subsection (2), "serv[ing] notice on the infringer," can truly only be done by the owner. See 17 U.S.C. 411(c).

works that are being transmitted 'live' at the same time they are being fixed in tangible form for the first time" and thus allows the copyright owner to obtain an injunction "to prevent the unauthorized use of the material included in the 'live' transmission." H.R. Rep. No. 94-1476, at 157; see 46 Fed. Reg. 28,846 (May 29, 1981).

Given that special situation, Section 411(c) creates a narrow but powerful *exception* to the registration prerequisite—permitting a claimant to seek injunctive relief under the Act without first obtaining registration, so long as registration is later completed within three months of transmission. See *Reed Elsevier*, 559 U.S. at 165 (characterizing Section 411(c) as one "exception[]" to "§ 411(a)'s registration requirement"). And to prevent powerful stakeholders (like professional sports interests) from abusing Section 411(c), it is entirely logical that Congress desired the Register's input in such cases. Cf., *e.g.*, *EMI Christian Music Grp., Inc.* v. *MP3tunes, LLC*, 844 F.3d 79, 97 (2d Cir. 2016) (affording *Skidmore* deference to the Register's registration decisions); *Varsity Brands, Inc.* v. *Star Athletica, LLC*, 799 F.3d 468, 479 (6th Cir. 2015), aff'd sub nom. *Star Athletica, L.L.C.* v. *Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017). Although processing times have increased since 1976, Congress likely envisioned an examination period of only a few weeks. Cf. GAO Report at 3. A diligent applicant could easily secure registration within three months.

In any event, petitioner's argument fails regardless of the Copyright Office's speed. Given that the Copyright Office and all relevant stakeholders understood that the purpose of Section 411(c) was to enjoin infringement of live broadcasts (for example, the Super Bowl), no ongoing infringement suit is necessary, as an injunction at the time of broadcast adequately protects the copyright holder's interests. Thus, in the mine-run case, the copyright holder

need not seek registration at all.[13] And in the rare case where an ongoing suit is necessary, special handling on an expedited basis is of course available.

3. Petitioner doubly misinterprets Section 408(c)(3)'s provision for single registration for multiple works by the same author. Petitioner claims that "registration is again 'made . . . by the author'" (Br. 25) (alteration in original), but that ellipsis is critical—as petitioner recognizes in the same paragraph, this subsection provides that "a single renewal registration may be made for a group of *works by* the same individual author." 17 U.S.C. 408(c)(3) (emphasis added). The prepositional phrase "by the same individual author" modifies "works," not "made." The "author" is not registering anything; she is creating the work. Further, that registration is "made" "upon the filing of a single application and fee" (*ibid.*) shows only that a *single* application and fee are required despite the presence of multiple works. As with "registration" as it appears throughout the Act, the Register remains necessary for registration.

4. Petitioner also thinks 17 U.S.C. 405(b)—one of the Copyright Act's constructive-notice provisions—helps its case because that section refers to registration having "been made under Section 408," while Section 408 in turn

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[13] That is what stakeholders themselves told the Copyright Office. For example, in response to the Register's 1981 Notice of Proposed Rulemaking regarding Section 411(c),

> [c]omments submitted on behalf of the professional sports interests * * * argued that the registration requirement is triggered only if the author or copyright owner proceeds to file an action for infringement. They indicated that they do not intend to register every work that is mentioned in [a pre-broadcast injunction], but will of course register the works if an infringement action is brought.

46 Fed. Reg. at 28,847. The Register accepted this view and thus declined to require registration anytime a copyright holder obtained a time-of-broadcast injunction. *Ibid.*

"describes how the *copyright owner* 'may obtain registration.'" Br. 25 (quoting 17 U.S.C. 408(a)). But, as discussed above, under Section 408, a copyright owner "obtain[s] registration" only once the Register approves. Before the Register acts, registration remains uncertain—the owner may *or may not* obtain registration. See 17 U.S.C. 410(a), (b).

5. Petitioner's reliance on 17 U.S.C. 205 again excludes the Copyright Office from "registration" without any textual support for doing so. Br. 26-27. This provision says that "[r]ecordation of a document * * * gives all persons constructive notice of the facts" therein if, among other things, "registration has been made for the work." 17 U.S.C. 205(c). As explained above, this provision makes sense only if "registration has been made" when the Register registers the copyright—*i.e.*, when the public would *in fact* have constructive notice of registration.

Moreover, Section 205 expressly contemplates that there may be a gap in constructive-notice protection while the Copyright Office acts—constructive notice arises only "*after* the document is indexed by the Register of Copyrights." 17 U.S.C. 205(c)(1). Petitioner's inventive, four-step hypothetical (Br. 26-27) proves nothing except that Congress could have struck a different balance in Section 205 had it considered that hypothetical and used different words to reach a different policy judgment. Cf. *Lawrence* v. *Florida*, 549 U.S. 327, 335 (2007) ("We cannot base our interpretation of the statute on an exceedingly rare inequity that Congress almost certainly was not contemplating").

6. Similarly, petitioner finds an isolated reference to "any deposit and registration made after th[e] [Copyright Act's effective] date in response to a demand under" the previous statute. 17 U.S.C. 407 note; see Br. 26. (This complicated provision preserves certain remedies from the

1909 Act while also requiring compliance with certain provisions of the 1976 Act.) Petitioner claims that registration must be "made" by the copyright owner because the "owner, not the Copyright Office" "responds to 'a demand.'" Br. 26. But, once more, that does not mean the Register has no role to play in making registration. The copyright owner responds to the demand by initiating the registration process through its application; the Register completes that process by approving, *i.e.*, making, registration.

In sum, nothing about the phrase "makes registration" excludes the Copyright Office. On the contrary, that phrase, just like the word "register" alone, necessarily incorporates the Register's official action.

II. THE HISTORY OF SECTION 411(a)'S ENACTMENT CONFIRMS THAT THE REGISTER MUST APPROVE OR REFUSE A CLAIM BEFORE SUIT MAY BE BROUGHT

The text leaves no doubt that an infringement suit may not be instituted before the Register acts. Because "[t]he text is clear," the Court "need not consider [any] extratextual evidence" of the statute's history and purpose. *N.L.R.B.* v. *SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017).

The history of the Copyright Act of 1976, however, confirms respondents' understanding of the plain text. Congress expressly acted to overturn a Second Circuit holding that forced copyright owners whose registrations had been refused to first seek mandamus to reverse the registration decision before suing for infringement. In doing so, Congress made clear that the Register must act one way or another before suit may be brought.

1. Before the Copyright Act of 1976, the law provided that "[n]o action or proceeding shall be maintained for infringement of copyright in any work until the provisions

of this Act with respect to the deposit of copies and registration of such work shall have been complied with." 17 U.S.C. 13 (1970). Everyone agreed that this meant the copyright owner could sue if the Register had registered the claim.

But courts disagreed about what to do where the Register had refused the claim. The problem was that Section 13 did not expressly permit suit after refusal, so a copyright owner's only recourse was to mandamus the Register. See Berger Study at 97 ("The unsettled question is whether a claimant who * * * has been refused registration on the ground that the copyright claim is invalid, must first secure registration by a mandamus action against the Register before he can maintain a suit for infringement; or whether he may sue for infringement without registration and have the validity of his claim determined in that suit.").

The seminal case, *Vacheron & Constantin-Le Coultre Watches, Inc.* v. *Benrus Watch Co.*, 260 F.2d 637 (2d Cir. 1958) (Hand, J.), illustrates both sides of the issue. The majority read Section 13 as making "acceptance by the Register" a prerequisite to suit, so Section 13 necessarily prohibited suit "when the Register of Copyrights had refused" the claim. *Id.* at 639-641 (Hand, J.). By contrast, the dissent would have allowed suit "'although registration was refused,'" in the interest of "simple justice" for the copyright owner who otherwise needed mandamus. *Id.* at 645-646 (Clark, C.J., dissenting) (quoting *White-Smith Music. Pub. Co.* v. *Goff*, 187 F. 247, 247 (1st Cir. 1911)).

In reacting to *Vacheron* and writing Section 411(a), Congress made clear that an infringement suit may not be brought until the Register has acted. The committee report explained that "[t]he first sentence of section 411(a)

restates the present statutory requirement that registration must be made before a suit for copyright infringement is instituted." H.R. Rep. No. 94-1476 at 157. That confirms that a copyright owner may invoke the first sentence only if the Register has registered the claim. The remainder of Section 411(a) "alter[ed] the present law as interpreted in *Vacheron*." *Ibid.* Under this alteration, "a *rejected* claimant who has properly applied for registration may maintain an infringement suit if notice of it is served on the Register of Copyrights." *Ibid.* (emphasis added).

Therefore, as the enacted text reflects, the first sentence allows suit where the Register has registered the claim, while the second sentence allows suit where the Register has refused the claim, so the copyright owner need not seek mandamus. But nothing in the history suggests that a copyright owner may bring suit before the Register has *either* made or refused registration.

The Copyright Office's recommendations for the 1976 revision underscore this history. Like the committee report, the Register told Congress to retain Section 13's prohibition on suit "until the work has been registered," but to abrogate *Vacheron* to obviate the need to "proceed[] first against the Register." 1961 Report at 75-76.

The Register's reasoning for these recommendations rested on the utility of the Register's registration determination in modulating litigation. As the report explained, "the registration process identifies unfounded claims and assists the courts in establishing presumptive facts and applying the law." *Ibid.* And suit after refusal made sense because the Register would have "the opportunity to advise the court of reasons for refusing registration." *Ibid.*

In either situation, the Register's decision—up or down—is critical.[14]

The text thus reflects the terms of the debate, and Congress made its choice deliberately. It decided to make registration optional with strong incentives for registration. See, *e.g.*, Kaplan Study at 1-27, 46-65 (reviewing alternative approaches). And after considering whether "registration, or application therefor, [should] be a prerequisite to an action for infringement" (Berger Study at 98), Congress made registration, not application therefor, the prerequisite.

2. Petitioner's revisionist history omits key facts. Petitioner's discussion of *Vacheron* ignores the critical context that it addressed how to proceed in the face of the Register's *refusal* and the resulting difficulty of seeking mandamus. As this Court explained, "courts had interpreted" Section 13 "as prohibiting copyright owners who had been *refused* registration by the Register of Copyrights from suing for infringement until the owners *first* sought mandamus against the Register." *Reed Elsevier*, 559 U.S. at 164 (emphases in original). The 1976 Act changed that result by allowing suits "where the holder attempted to register the work and registration was refused." *Id.* at 165. That does not mean Congress intended that a copyright owner could sue before the Register acts.

So while petitioner is correct that "[t]he statute rejects the result reached by the Second Circuit," it is a leap of logic too far to think that Congress dispensed with the Register's action. Br. 34. The goal, unequivocally, was

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[14] Petitioner plucks a line from the report's summary that says "application for registration would still be a prerequisite to bringing an infringement suit." 1961 Report at vi-vii. As the report disclaims, however, the summary "is necessarily oversimplified." *Id.* at v.

simply to eliminate the need to sue the Register to reverse refusal of registration.

The same misunderstanding infects petitioner's argument that respondents' interpretation "recreates the very problem to which critics of the *Vacheron* rule objected." Br. 35. The *Vacheron* "problem" resulted from copyright owners having no recourse but mandamus where the Register refused registration—*Vacheron* was "unfortunate" only due to "the delay involved in proceeding first against the Register." 1961 Report at 75. The 1976 Act easily and directly solved that issue. But the "studies and reports" (Br. 35) also emphasized the importance of the information gleaned from the registration process, "which assists the courts in establishing presumptive facts and applying the law." 1961 Report at 75; see Berger Study at 97-98. Allowing suit before the Register has acted at all, as petitioner urges, would unacceptably undercut the registration system.

In truth, petitioner's argument is a dressed-up policy complaint about the consequences of the Copyright Office's delay. Petitioner is unhappy that processing times have increased. Br. 36. But as discussed below, that is a funding problem, not an interpretive one. The text and history make clear that Section 411(a) demands the Register's action as a prerequisite to suit. If petitioner wants an application to suffice, Congress must change the law.

III. IF PETITIONER WANTS THE LAW CHANGED OR MORE FUNDING FOR THE COPYRIGHT OFFICE, IT SHOULD ADDRESS CONGRESS OR THE COPYRIGHT OFFICE, NOT THIS COURT

The details of a copyright-registration system—including whether a registration system should exist at all—pose knotty policy questions for lawmakers, issues so contentious and layered that Congress studied them for over two decades before passing the Copyright Act of

1976. And Congress has continued to tweak the Act over the years in response to stakeholder concerns.

On the broad question of the wisdom of a public registration system, Congress opted for permissive registration. On the narrow question at issue here, Congress made registration (or refusal) a prerequisite to judicially enforcing copyright protection. Those two questions are not independent—because Congress made registration optional, it needed to attach strong incentives for authors to seek registration as near as possible to publication. The registration approach thus reflects the sensible compromise between advocates for a strong registration system and those for no registration system, whereas petitioner's application approach would remove a significant registration incentive that underpins Congress's compromise.

Petitioner and *amici* essentially attack Congress's policy choice. They strenuously argue that the application approach better comports with the Copyright Act's purpose and avoids a host of supposed practical problems that infected the prior law. Br. 35-43. To be sure, there were reasonable arguments for Congress to pick an application approach or to eliminate the registration system entirely, and petitioner has done an excellent job covering that side of the debate. But that side lost—in 1976, and also in 1988, 1993, and 2005.

And it should lose in this Court, too, for the current text makes Congress's judgment clear. As the Court has repeatedly reminded litigants, "We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable. Instead, we must give effect to the text Congress enacted * * * ." *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008); see also, *e.g.*, *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) ("[W]e will not presume with petitioners that any result consistent with their account of the statute's overarching goal must

be the law but will presume more modestly instead 'that [the] legislature says * * * what it means and means * * * what it says.'" (citation omitted) (alterations in original)); *W. Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98 (1991) ("[t]he best evidence of [Congress's] purpose is the statutory text").

Indeed, as detailed below, petitioner's "practical problems" (Br. 41) are overstated precisely because the political branches considered them and implemented concessions to alleviate these issues while maintaining a robust registration system. Petitioner and its *amici* obviously wish Congress had chosen differently, but the merits and demerits of a registration system and the consequences of securing (or failing to secure) registration are policy questions for Congress, not the Court. "[I]n light of the tempestuous legislative proceedings that produced the Act," "[t]he present language was clearly the result of a compromise. It is [the Court's] task to give effect to the statute as enacted." *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 818-819 (1980). Petitioner and *amici* should submit their briefs to Congress; here, their arguments fail.

1. The reason petitioner's position came up short in Congress is that it would weaken the registration system and thereby harm the public, even though it might benefit authors. Copyright law does not serve only content creators; far from it, its primary concern is public welfare, and even an author's copyright monopoly "is a means to that [public-service] end." 1961 Report at 5.

As discussed, registration bestows multiple benefits, and forbidding suit until the Register registers (or refuses) the claim vindicates Congress's goal in encouraging registration. Moreover, *early* registration is key: "To be most useful and reliable as a source of information, registration should be made shortly after the first public dissemination of the work." 1961 Report at 74.

The application approach fails to similarly spur registration. It incentivizes copyright owners to wait to seek registration until litigation is imminent. That is suboptimal because the default state of the world is one in which copyright infringement and litigation do not occur. By contrast, respondents' registration approach gives copyright owners one more reason to seek approval of their claims as soon as possible—because they will not know whether they'll ever need to sue for infringement, they must obtain registration as soon as possible to be ready for that later possibility.

What's more, unlike the application approach, the registration approach promotes the benefits of registration that are particular to (potential) litigation, namely, weeding out frivolous claims and shaping issues that must be litigated in any given case. See, *e.g.*, H.R. Rep. No. 609, 100th Cong., 2d Sess. 41-42 (1988) ("If the requirement of registration as a prerequisite to suit were eliminated, there would likely be increased difficulty in trying copyright cases."); *id.* at 41 (the registration requirement "promotes efficient litigation practices, to the benefit of the courts and the public as well as to the parties in the lawsuit"); *id.* at 42 (discussing with approval that "suits have been kept out of court by the necessity of * * * registration and by the unwillingness of potential plaintiffs * * * following the [Register's] refusal to register because of the unfavorable light in which a judge might view the refusal to register and the undesirability of having the Copyright Office intervene in opposition"); 1961 Report at 75 ("Since the registration process identifies unfounded claims and assists the courts in establishing presumptive facts and applying the law, we believe the requirement of registration before suit should be maintained.").

That petitioner's approach would still allow the Register to intervene in an ongoing action is immaterial. Br. 39-

40. Such intervention fails to vindicate Congress's desire to have the Register's input *before* suit is filed (or at the very least before litigation has proceeded too far).

On the author's side, respondents' registration approach also leaves substantial protection for copyright owners who diligently pursue their rights. In the first place, applying for registration is not difficult—it requires completing a short form and paying a small fee. In situations where even that minimal obligation might prove too burdensome, Congress and the Copyright Office have provided accommodations. As discussed, without registration, copyright owners can seek an injunction in advance of a live broadcast. See 17 U.S.C. 411(c). And for multiple categories of works, owners may "preregister" a copyright, even before first publication, in certain circumstances where the delay in obtaining registration could cause irreparable harm (for example, to prevent piracy of highly anticipated movies or musical albums). 17 U.S.C. 408(f).[15]

Additionally, an owner who cannot avail herself of those remedies can use the Copyright Office's "special handling" procedure to obtain registration quickly. See U.S. Copyright Office, *Special Handling: (Circular 10)* 2 (2017). Petitioner counters that expedited handling is impractical because the cost of expediting may be prohibitive to litigants. Br. 41-42. But the $800 special-handling fee is a pittance compared to the cost of litigating a copyright action in federal court, where the case initiation fee *alone* is $400. See 28 U.S.C. 1914(a) ("instituting any civil

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[15] The Register has the authority to add classes of works eligible for preregistration. 17 U.S.C. 408(f)(2). If stakeholders think that the current categories are underinclusive (*e.g.*, Copyright Alliance Br. 12-13), the proper recourse is asking the Copyright Office to exercise that authority, rather than asking the Court to broadly rewrite Section 411(a).

action" requires "a filing fee of $350"); U.S. Judicial Conference, *District Court Miscellaneous Fee Schedule* (2016), https://goo.gl/mNWFhX (additional $50 "[a]dministrative fee for filing a civil action"). Thus, in the hypothetical case where waiting out the normal process would substantially jeopardize a claim, the special handling fee is at worst a marginal additional burden on the copyright holder.[16] Petitioner complains that even special handling might not "guarantee" resolution "by any deadline" (Br. 42), but there is no reason to think that it will fail an applicant who promptly seeks registration as Congress intended.[17]

As a whole, the registration process and all its permutations and exceptions represent a careful compromise between promoting registration and respecting copyright owners. Respondents' registration approach alone respects that bargain.

2. The bulk of petitioner's and *amici*'s complaints boil down to attacks on the registration system as a whole and unhappiness with the Copyright Office's efficiency. Neither objection has merit.

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[16] Petitioner argues the expense of expediting is particularly problematic in cases involving multiple works. Pet. 42. But petitioner dramatically overstates the scale of the issue. Petitioner offers no example of this problem, and, again, the Copyright Office has forestalled such concern—in many cases, a group of works (like a musical album, an anthology of poems, or a collection of articles in a periodical) can be expedited together by paying a single fee. See U.S. Copyright Office, ***Multiple Works: (Circular 34)*** 2-4 (2017).

[17] The ABA objects that special handling is an option "only in limited circumstances" like "pending or prospective litigation." ABA Br. 26. But if litigation is neither pending nor prospective, then a copyright owner will not care whether registration is a prerequisite to litigation.

a. Throughout its brief, petitioner bemoans the consequences of the Copyright Office's delay in acting on applications. That the Copyright Office is not as efficient as it once was provides no support for petitioner's interpretation of Section 411(a).

First, Congress was obviously aware that there would be some delay between application and approval. As discussed, where that delay might substantially prejudice a copyright owner, Congress provided various tools—preregistration and immediate suit for live broadcasts—and the Copyright Office offers expedited handling. Like the copyright owners who spurred the preregistration amendments, petitioner and its *amici* might prefer a different solution, namely, eliminating the registration requirement altogether. But Congress thought it better to compromise, and that judgment cannot be overruled by the judiciary.

Second, processing times were shorter when Congress acted. See GAO Report; cf. Br. 42 & n.28. It thus made perfect sense that Congress would draft a statute that contemplated registration decisions occurring in just a few weeks at most. To the extent those times have increased, petitioner should ask the political branches for more funding. It is not for the judiciary to rewrite the law to accommodate changed circumstances.[18]

b. Petitioner and its *amici* hope the Court will do what Congress would not. They oppose registration as a matter of policy, and 'interpreting' the word "registration" to

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[18] The last paragraph of petitioner's argument section betrays its true target, when it hypothesizes a world where "the Copyright Office were better funded and more efficient and routinely provided service within days of filing—as was once the case." Br. 42 (footnote omitted). The acknowledged change in processing times over the years confirms that this matter is for Congress, not the Court.

mean "application for registration" would move the Copyright Act closer to their core policy position. Cf., *e.g.*, Int'l Trademark Ass'n Br. 6 (arguing that Section 411(a) "should be interpreted to be consistent with Berne" by eliminating the formality of registration); ABA Br. 33-34; Authors Guild Br. 9 (lamenting that "the statutory balance has tipped away from authors in recent years"). But Congress indisputably and expressly considered that policy option and rejected it. *E.g.*, Kaplan Study at 64 ("Should the copyright law provide for an official system for registering claims to copyright?"); *ibid.* ("If the system is to be optional, how far should registration thereunder be induced by relatively mild sanctions or encouraged by special advantages: (a) Should registration (or official refusal of registration) be required in order to maintain an action for infringement?").

And since 1976, Congress has repeatedly rebuffed similar policy arguments that registration imposes a wasteful formality. *E.g.*, H.R. Rep. No. 388, 103d Cong., 1st Sess. 9-11 (1993) (arguing in favor of "eliminat[ing] the last significant vestiges of the formality-based approach to United States copyright law" for these reasons); 70 Fed. Reg. at 42,286 (recounting the legislative debate over pre-release infringement); *supra* at 11-12. If petitioner and its *amici* want a different outcome in 2018, they need to petition Congress.

3. Accordingly, petitioner's specific arguments about the Copyright Act's overall approach can be easily brushed aside.

Petitioner's objection to "making the Copyright Office the gatekeeper to enforcement of copyrights" is a veiled attack on the registration system. Br. 37. Congress indisputably distinguished between "copyright protection" and *enforcing* that protection. And the registration approach does not "render a [copyright] 'valueless'" (Br. 37)—as

even petitioner admits, if an author diligently applies for registration soon after publication, she is entitled to the full panoply of copyright remedies, including statutory damages, fees, and costs. See *supra* at 32-33 (explaining that statutory damages are available as of the "effective date" of registration).

Petitioner's worry that the statute of limitations might cause "the copyright owner [to] forever lose any ability to enforce the very rights the Act grants" (Br. 41) is hyperbole. Petitioner has not cited any case where such forfeiture has occurred. The ABA locates a single, 25-year-old decision, but it actually supports respondents' position. ABA Br. 30-31; *Kregos* v. *Assoc. Press*, 795 F. Supp. 1325 (S.D.N.Y. 1992). In *Kregos*, the copyright owner created his work in 1983 but didn't apply for registration until June 1985 (despite the Copyright Office warning that claims for that type of work "would be delayed"). *Id.* at 1328, 1331. The court declared that the plaintiff's "statute of limitations problem was itself a self-induced problem," as plaintiff had "sat on his rights for so long." *Id.* at 1331. That dilatory behavior is precisely what Congress wanted to avoid in incentivizing early registration through the registration prerequisite.

As *Kregos* exemplifies, a copyright owner risks her claim only if she waits to seek registration until long after infringement has begun. Given today's six- to eight-month application processing times, a plaintiff would have to delay seeking registration more than two years for the statute of limitations to become relevant. And in most courts

the clock begins to run only based upon discovery of infringement.[19] Moreover, again, the currently long processing times have nothing to do with the proper interpretation of the text Congress enacted in 1976.

Finally, petitioner thinks it "strange" that the "effective date" of a registration would not match the date a copyright owner can bring suit. Br. 38. But this is perfectly sensible given Congress's (again undisputed) interest in encouraging registration as early as possible after publication. Under petitioner's view, by contrast, an author might wait to apply for registration until she needs to sue. That is flatly inconsistent with incentivizing early registration. And the fact there are other such incentives (like statutory damages) is immaterial; as the Copyright Office has explained, "'the incentives to register are, in essence, a bundle. The removal of one incentive will likely result in the loss of some registrations.'" S. Rep. No. 100-352 at 20.

Congress deliberately maintained registration as a prerequisite to suit so that the public would benefit from copyright owners seeking registration promptly. Petitioner offers multiple reasons that Congress could have reasonably chosen otherwise, but those reasons are no answer for the text that Congress enacted. Petitioner's suit was properly dismissed, and the court of appeals' judgment should be affirmed.

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[19] See 6 William F. Patry, *Patry on Copyright* § 20:19 (2017) ("The overwhelming majority of courts use discovery accrual in copyright cases."); *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 n.4 (2014) ("Although [this Court] has not passed on the question, nine Courts of Appeals have adopted * * * [this] 'discovery rule,' which starts the limitations period when 'the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim.'" (quoting *William A. Graham Co.* v. *Haughey*, 568 F.3d 425, 433 (3d Cir. 2009))); see also Pet. 5 n.5 (noting that "[t]he courts of appeals have uniformly" adopted the discovery rule).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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